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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 09-0688

DAVID ARONOFSKY
12305 Gun Metal Drive
Austin, Texas 78739
406-531-6857 aronofskyd@mso.umt.edu

November 15, 2016

The Honorable Justices of the Montana Supreme Court
215 N. Sanders, Justice Bldg.
Helena MT 59620

Re: Proposed MRPC Rule 8.4 Revision Comments

I am writing to suggest amending, for important clarification purposes, the proposed new MRPC Rule 8.4(g). I limit my comments to the proposed Rule 8.4(g) harassment aspect. I suggest defining harassment to incorporate the 9th Circuit approach in *U.S. v. Osinger*, 753 F.3d 939, 944-45 (9th Cir. 2014). Using Black's Dictionary, *Osinger* defined the term as "words, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose"

I had years of experience, as The University of Montana General Counsel and as an Education Law Professor in the UM Schools of Law and Education, with harassment definition and application issues because of federal First Amendment and substantive due process constraints. Various appellate courts have rejected efforts to impose punitive discipline on undefined harassing behavior, and expecting even experienced lawyers to know when it occurs seems unrealistic. See, e.g., *Rodriguez v. Maricopa County Community College District*, 605 F.3d 703, 708 (9th Cir. 2009) and *Saxe v. State College Area School District*, 240 F.3d 200, 209 (3rd Cir. 2000) (both noting an absence of a First Amendment harassment exception); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995); *State v. Bishop* (Case No. 223PA15, N.C., June 16, 2016). Although the 9th Circuit indicated, both in *Osinger*, 753 F.3d at 944, and more recently in *O'Brien v. Welty*, 818 F.3d 920, 930 (9th Cir. 2016), that defining harassment is not necessary to impose punishment, the Court nonetheless cited definitions to support its rulings. The policies at issue in various cases were drafted by experienced attorneys who deemed them valid as written and applied. Attorneys can reasonably reach divergent interpretations on what constitutes harassment. ABA Model Rule 8.4, the basis for proposed Montana Rule 8.4(g), has already generated controversy as seen in the August 17, 2016 *Jurist*, <http://www.jurist.org/hotline/2016/08/brad-abramson-speech-rights.php>. Using *Osinger* to define harassment in proposed Rule 8.4(g) will help this Rule withstand legal challenge.

Sincerely,

David Aronofsky
Montana Bar #3386

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